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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1265

WILLIAM B. SAXBE, Attorney General of the United States, and NORMAN A. CARLSON, Director, United States Bureau of Prisons,

Petitioners,

v.

THE WASHINGTON POST CO. and BEN H. BAGDIKIAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS LEGAL DEFENSE AND RESEARCH FUND AS AMICUS CURIAE

INTEREST OF THE AMICUS

This brief amicus curiae is submitted, with the consent of the parties (pp. 1a-2a, *infra*), on behalf of The Reporters Committee for Freedom of the Press Legal Defense and Research Fund. The Committee, as its name implies,

is made up of working news reporters and editors actively engaged in the business of gathering news for newspapers, magazines, television and radio.[1] Its purpose is to advance one of the great principles set out in the First Amendment: that government shall not impair the people's right to know by abridging the freedom of the press.

In the light of that purpose, the Committee has a particular concern with the issues in this case and the related cases that are to be heard with it. The concern arises from the beliefs of Committee members and their colleagues in the news gathering trade who have had experience in trying to report on correctional institutions that there are many arbitrary governmental barriers to access by news gatherers to prisons and prisoners that impair the performance by the press of its function of informing the public.

The Committee, a group made up of working news persons, hopes that it can assist the Court by providing the perspective of its members and their colleagues of the working press on problems of covering correctional institutions.

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[1] The members of the Steering Committee are, from *Washington*, Elsie Carper, Washington Post; Lyle Denniston, Washington Star-News; Fred P. Graham, CBS News; Jack C. Landau, Newhouse Newspapers; Robert C. Maynard, Washington Post; Jack Nelson, Los Angeles Times; Eileen Shanahan, New York Times; Howard K. Smith, ABC News; from *New York*, Kenneth Auchincloss, Newsweek; Walter Cronkite, CBS News; Nat Hentoff, freelance; Anthony Lukas, freelance; Lemuel Tucker, ABC News; from *Boston*, John Kifner, New York Times; John Wood, Boston Globe; from *Chicago*, Joel Weisman, Chicago Sun-Times; from *Denver*, Linda Cayton, College Press Service; from *Miami*, Gene Miller, Miami Herald, and from *New Orleans*, Wilson F. Minor, Times-Picayune. The statement of affiliations is merely to identify the individual members and does not imply endorsement of the positions taken by the news media named.

The Committee is especially concerned that the Court should be aware that the prohibition of prisoner interviews is not the only barrier to effective prison coverage that the press confronts. The result of the restrictions has been to limit the facts available to the public about public institutions of the utmost social importance in which thousands are held as inmates by officials charged with responsibility for their rehabilitation. The decision in this case and its companions will necessarily affect subsequent decisions dealing with other aspects of press access to prisons.

SUMMARY OF ARGUMENT

I

Public interest in correctional institutions has probably never been at such a high level in the nation's history. The interest is wholly legitimate. Vast amounts of public funds are expended on our correctional institutions with what appears to be indifferent success at best. Yet, insistence on public accountability for what happens in these institutions is hampered by their relative inaccessibility. The information concerning prisons and prisoners that the citizen who would be well informed can obtain from the popular periodical press and radio and television is, for the most part, scanty indeed. Coverage is still limited pretty much to sporadic incidents of violence – riots, strikes, murders and assaults and escape attempts.

The blame for this condition lies in part with the press. The press has been slower in this area than in some others to depart from the habit of concentrating its coverage on dramatic manifestations of society gone awry, of which incidents of prison violence are prime examples. But much of the blame for the paucity of news concerning prisons

and prison life is attributable to official policies of which the regulations under challenge in this case and its companions are examples. A press that tried wholeheartedly to perform its high function of keeping the people informed about correctional institutions could not do so under present governmental restrictions.

II

The regulation in issue here bans interviews between news gatherers and specified, willing subjects of interviews. It is illustrative of the pattern of restrictions that prevents the press from doing its appointed job with respect to prisons as effectively as it could.

The ban on interviews, which is all that is narrowly at issue here, is a most significant part of that pattern. Face-to-face interviews at the reporter's request are an important tool of his trade. No other means of obtaining news of events that are not heard or seen serves so well the interests of reliability and timeliness. The reporter cannot do his job if he merely sits back and awaits an inmate's request that he, the inmate, be interviewed. Written communications from inmates are not an adequate substitute for interviews. Nor are conversations with random inmates or with groups of inmates. Certainly the opportunity to talk with correctional officials or with recently released inmates is not sufficient.

III

But the interview ban remains just one example of restriction of access to prisons and prisoners and should be seen as a part of the larger pattern. The experience of

the reporters with whom the Committee has been in touch and answers to a questionnaire that it circulated among 60 correctional administrators indicate that there are a number of such restrictions. The restrictions on access sometimes go beyond any conceivable needs related to the peculiar status of prisons and prisoners when they include budgetary and personnel records of the kind that are freely available from other public agencies. The problems posed to the press by the nature of the substantive restrictions on access to prisons and prisoners are aggravated by the inadequate or nonexistent procedures for requesting access.

In addition to having the opportunity for interviews with named and designated inmates, the press should have, within the limits of legitimate requirements of institutional security and performance of penal and rehabilitative functions and the protection of inmate privacy, the opportunity (1) to witness prison life, (2) to talk with random prisoners and groups of prisoners about prison life, (3) to observe the prison justice system in operation, (4) to study records of correctional systems – budgets, personnel records and the like – to the same extent that it can study records of other public agencies. Further, the press needs to know where to turn to obtain access to prisoners, prison personnel and prison records. Any particular barrier against access will of course have to be judged on its own merits and in the light of the justification offered for it. The record here demonstrates the lack of justification for the ban on interviews, and experience and common sense indicate that there is as little warrant for many or most of the other restrictions.

IV

Within the prison the press serves a very traditional function: that of ensuring that the public is informed about what happens in places where, as a practical matter, not all members of the public can be. The significance of the specification of the freedom of the press, in addition to the freedom of speech, in the First Amendment lies in part in the recognition that merely to protect the press' freedom to speak is not enough. This Court has indicated that news gathering has its First Amendment protections. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). To say that the news gathering function is to be protected against arbitrary restraints is not to say that the First Amendment guarantees "the press a constitutional right of special access to information not available to the public generally." *Id.* at 684. Rather, it is to say that, as a practical matter, some information properly available to the public can be obtained and delivered to the public only by the press, and in fulfilling this function the press has constitutional protection.

ARGUMENT

I. CORRECTIONAL INSTITUTIONS ARE MAJOR PUBLIC INSTITUTIONS IN WHICH CITIZENS HAVE A LEGITIMATE INTEREST BUT WHICH ARE EFFECTIVELY SHIELDED FROM SUCH INTEREST.

More than 400,000 persons are inmates of the nation's approximately 4,500 jails, prisons and other detention and correctional institutions.[2] The turnover of this inmate

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[2] The inmate figure includes the inmates of federal and state prisons, public institutions for juveniles and locally administered jails

(Cont'd)

population is immense. In 1968, the last year for which the figures have been compiled, 120,000 persons were admitted to long-term state and federal correctional institutions and about the same number left. The total inmate population in such institutions at the end of that year was not quite 190,000.[3] Allowing for repeaters in prison admissions but taking account of the even greater turnover in jails, the figures indicate that the number of Americans now alive who have spent or will spend some time in jail or prison runs into the millions. Almost all of those who are committed, whether to an overnight stay in a local lockup or to a theoretical life sentence in maximum security, will return to society; the average length of a prison term, even after conviction of a serious crime, is less than two years.[4]

To maintain and support this vast system of correctional institutions, governments at all levels spent nearly $2.5 billion in fiscal 1972. Nearly 200,000 persons are employed in the system.[5]

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2 (Cont'd) but excludes lockups and other facilities in which people are detained for less than 48 hours. See Department of Justice, *National Prisoner Statistics Bulletin*, No. 47, April 1972, p. 2 (state and federal prisons, 1970, 196,429); Department of Justice, *National Jail Census*, 1970, p. 2 (jails, 160,863); *Statistical Abstract of the United States*, 1973, p. 162 (juvenile institutions, 66,457).

3 The figures are from *National Prisoner Statistics Bulletin, supra* at 2, 4.

4 Department of Justice, *National Prisoner Statistics – State Prisoners: Admissions and Releases*, 1970, p. 4; Statistical Abstract, *supra* at 166.

5 Department of Justice, *Expenditure and Employment Data for the Criminal Justice System*, 1971-72, p. 11, tables 2 (expenditures), 3 (employment).

As a consequence of the facts that these figures mirror, there is a legitimate public interest in and concern with what happens inside tax-supported prisons and jails. The level of that interest is probably higher today than at any time in the nation's history. In remarks prepared for presentation at a National Conference on Corrections in December 1971, President Nixon said, "At long last, this nation is coming to realize that the process of justice cannot end with the slamming shut of prison gates." Studies of prison reform, legislative hearings on prison reform and organizations devoted to prison reform have proliferated in recent years.

With all of this, however, the prison remains the least known side of the criminal justice system. The ordinary concerned citizen perceives only dimly that the correctional and penal institutions are, by his gross standards, falling far short of their goals. Their existence, the threat of incarceration that they represent, seems not to deter crime, and their rehabilitative efforts yield a fantastic rate of recidivism. President Nixon, in the same remarks quoted above, stated a commonplace when he said that "Our prisons are still colleges of crime, and not what they should be – the beginning of a way back to a productive life within the law."

Yet, despite the great public importance of penal and correctional institutions and their apparent failures, our concerned citizen is fairly helpless to know whom he should try to hold to account. The accountability of the administrators of the correctional system and the elected officials above them is enveloped in the mystery that tends to envelop all aspects of prison life. The penologists' studies, even the legislative hearings, are not of great assistance to the citizen who would like to be informed and who is

dependent on the daily newspaper and television and radio and popular magazines for most of what he knows about public affairs.

The page-one prison stories in his newspaper, the stories that will make the 6 o'clock television news programs, are generally stories of the dramatic, destructive and frequently tragic confrontations in which inmates seize the channels of communication to assert by their conduct and their words what they think of their life in prison. When there is no Attica or District of Columbia jail uprising or other major disturbance on page one, the occasional prison and jail stories on the inside pages are likely to be ephemeral stories of stabbings, escapes and attempted escapes. In short, the citizen who relies on the popular newspaper and periodical press or television for information about prisons does not receive a continuing, coherent account of prison affairs. Only such an account would enable him to make the kind of citizen's judgment that is appropriate about what should be done to ensure the most provident use of his taxes in supporting institutions that have such a significant effect on the quality of his life.

In part, the blame for this situation lies with the press. The Committee knows of but one major metropolitan newspaper in the entire country that has made the prisons of the jurisdiction in which it publishes a full-time beat for a reporter. There are sporadic pieces of serious prison reporting by various magazines, papers, networks and stations, but most prison reporting is of the kind that has been described – surface, immediate accounts of dramatic, violent events. The press is frequently as habit-ridden as other institutions. As this Court has been made aware by other briefs, when New York City opened its correctional

institutions to reporters, there was no rush to accept the invitation.[6]

But the press' habit of surface reporting of prison affairs is itself the product of years of frustration of efforts made to report in any but a surface way. The blame for the conditions that gave rise to the frustration do not lie with the press. In the reporting of other aspects of public affairs, the press has broken increasingly with traditions of finding news mainly in dramatic, overt manifestations of something amiss. The best of the contemporary press tries to tell a coherent, continuing story about legislative affairs, the doings of executive departments, science and medicine, the environment and, it should be said, the other aspects of the criminal justice system – the commission of crimes, the apprehension of those thought responsible and their trials and appeals. The aim is to impart to the public, information on public issues necessary for the making of the informed choices that democracy presupposes.

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[6] The judgment of the Committee on the performance of reporters and their employers of the press is comparable to but perhaps harsher than that of William J. vanden Heuvel, New York City lawyer and onetime chairman of the City's Board of Correction. While holding that position, he wrote in 1972:

> "For the most part, the press has accepted arbitrary and ridiculous regulations that keep it from reporting the true nature of our institutional tragedies. It has been content to report events such as prison riots."

He added that, "Two years ago, the prisons were a media wasteland," but said, "An unprecedented turnabout is underway." vanden Heuvel, *The Press and the Prisons*, Columbia Journalism Review, May/June 1972, p. 35 at 35-36. The turnabout that vanden Heuvel saw is still underway, but it proceeds slowly.

A press that tried its utmost to duplicate with respect to prisons and prisoners its efforts in other areas would find itself hampered in doing so because of the restrictions placed by prison officials on access to their facilities, their records and their wards. The ban on prisoner interviews that is in issue here and in the cases with which this case is being heard is an important aspect of the pattern of such restrictions.

II. A FLAT PROHIBITION ON ALL INTERVIEWS WITH PRISONERS IS AN UNWARRANTED RESTRICTION ON NEWS GATHERING.

No technique is more important to a reporter than that of the individual interview. Traditionally, the interview has probably been the principal technique by which news is developed and gathered.

Comparatively few news events are actually witnessed. Most of what we read in the daily paper or hear on the evening television news is based on what somebody told a reporter. Some stories, including some important ones, are inherently of that order; one can readily sense the cost of living going up, but one cannot "see" the precise rise of the index. As for events that can be experienced, there simply are not and cannot be enough reporters to be on hand for every spontaneous news break. Even many planned, prescheduled activities go unstaffed, in press parlance, because other demands on the reportorial staff are more pressing.

In many cases, someone is interested in seeing that an event is reported, and therefore press releases are distributed to the news media. For simple, straightforward events a handout of this sort often suffices. (The Government,

in effect, suggests reliance on handouts from prisoners when it argues that prisoner letters are one of the "alternative means of obtaining necessary information about prisoners and prison conditions" that make individual interviews unnecessary. [Pet. Br. 36]). However, where events of high public importance and especially events that are controversial are involved, the handout is clearly not good enough.

It is important in such cases that what the reporter is told be tested for its accuracy and reliability. The reporter frequently needs to question and cross-question the person who seeks to impart information to him or from whom he seeks to elicit information. Any investigator proceeds by means of interviews to probe the accuracy and reliability of what he is told. Interviews are particularly important when the source of information has a natural bias and is not well known to the investigator. This will ordinarily be true of the inmate sources of prison reporters.

Besides the fact that it makes impossible any testing for reliability, the prisoner-letter technique that the Government suggests as a substitute for interviews creates hopeless problems of timeliness.[7] Even were the suggested substitute broadened to permit interviews on the written request of the inmate, it would not do. Reporters are, or are meant to be, in the business of aggressively seeking out information, not waiting for it to come to them.

The other substitutes suggested by the Government (Pet. Br. 36-37) are no better, either singly or in combination. What might be learned about today's prison conditions

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[7] And in some jurisdictions there would be at least the fear, if not the reality, of official censorship of a letter.

from an interview with an inmate cannot be duplicated by talking with former inmates or with people who have themselves spoken with inmates or, much less, by talking with prison officials or hearing them testify before congressional committees.

Only literally is the key statement that the Government makes in the course of its discussion of alternative means of obtaining information true: "The policies and operations of the Bureau of Prisons and its institutions are not immune from press scrutiny or public view." (*Id.* at 37.) They may not be wholly immune from such scrutiny and view, but so long as reporters are barred from talking face-to-face on a confidential basis with individual inmates, the scrutiny is going to be less focused and the view dimmer.

We leave to the parties a detailed discussion of the justifications offered for the prohibition on interviews with individual inmates. Here, we would merely note that the record below shows, and the District Court found, that a substantial number of jurisdictions whose prison administration problems are comparable to those of the federal system generally allow prisoner interviews. The finding is borne out by the results of a questionnaire that the Committee addressed to prison administrators, described more fully immediately below. Of 37 administrators responding to the questionnaire, 26 said that, with limitations in some cases, they generally permit person-to-person, unmonitored interviews between reporters and inmates to which the inmate consents, and as a result of which, if the inmate agrees, his name can be used in any story that is published. Ten administrators said that they generally do not permit such interviews, and one said that he never does. All but two of the 34 administrators answering another question said that their interview policy is the same for all adult

offenders. Perhaps significantly, slightly more than half the administrators responding said that their interview policy had changed in the last five years. A prohibition of inmate interviews clearly has not been found to be essential to the orderly management of a prison system.

III. THE PROHIBITION OF PRISON INTERVIEWS IS BUT ONE OF A NUMBER OF RESTRICTIONS THAT VARIOUS JURISDICTIONS PLACE UPON ACCESS TO PRISONS, PRISONERS AND PRISON RECORDS.

The narrow issue in this case and its companions is the constitutional validity of an outright prohibition on individual interviews with prisoners. The Committee believes it important, however, that the Court see this prohibition in the context of the overall pattern of arbitrary restrictions that hamper the press in the efforts it makes to report on prisons and prison life.

In 1972 the Committee sent to correctional administrators of the 50 states, the District of Columbia and selected large cities, and to certain military correctional institution administrators a questionnaire asking about their policies and practices concerning press access. Thirty-seven administrators responded. The last response was received in February 1973. The Committee's views in this section of the brief are based upon the returns from that questionnaire – for which no scientific sampling validity but only a generally accurate impression is claimed – and the experiences of individual reporters who have written about prisons and who discussed their experiences at two meetings convened by the Committee in the thought of possible amicus participation in this case.

One thing stands out from the replies to questionnaires and what the Committee has been told by reporters who have covered prison affairs: A substantial number of prison administrators believe that the press is not well informed and is interested mainly in sensationalism. Thus, it seems that many prison administrators do not fully trust the press. We suggest that an attitude of concern about the kind of stories that will appear has at least as much to do with prison access policies as legitimate concerns for security, privacy and rehabilitational and correctional policies.

What, then, are some reportorial needs, apart from face-to-face interviews, the fulfillment of which is hampered in some correctional systems?

1. Reporters should be able to walk about, to see the inside of prisons; including facilities for living, sleeping, and working; for medical care, recreation, rehabilitation and discipline; and

2. As a concomitant they should be able to talk with random prisoners or groups of prisoners about prison life.[8] Random conversations are not a substitute for confidential interviews, but they are useful in enabling the reporter to ascertain general inmate views, to develop stories and to

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[8] Almost all prison administrators responding to the Committee's questionnaire (34 of 37) indicated that they permitted the press to view prison facilities by means of guided tours or under some other method of supervision. Those answering the tour question affirmatively said also that during such tours reporters would be permitted to stop and talk with inmates or guards. Nevertheless, in some jurisdictions reporters have encountered what they consider undue restrictiveness as to the circumstances in which they can see the inside of prisons.

identify those with whom confidential interviews would be productive.[9]

> "The press must have disciplined but total access to the prisons, not only to record the tours of dignitaries, but more important, to chronicle the emptiness and injustice of prison life, [and] to record the countless examples of failure in the bail and sentencing procedures. . . ." vanden Heuvel, *The Press and the Prisons*, Columbia Journalism Review, May/June 1972, p. 35 at 38.

3. They should be able to attend prison disciplinary hearings to observe the prison justice system in action.

4. They should have access to records of the kind that are commonly made available when they relate to other agencies of Government. This last need is particularly important because, when a reporter is working on what has come to be called an investigative story, *i.e.*, a story that relates not to some specific immediate event but to a course of conduct that someone would prefer not be disclosed, his

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[9] The *Boston Globe* is the newspaper referred to at p. 9, *supra*, that has a full-time prison reporter. In a story that appeared in the *Globe's* issue of November 2, 1973, the reporter, Stephen Wermiel, effectively used both random interviews and a planned interview with a known inmate source in reporting on conditions under a new superintendent in the maximum security prison at Walpole, Massachusetts. Unnamed inmates "selected at random in the prison halls" were quoted as expressing, in Wermiel's words, "a unified dissatisfaction with living conditions." The inmate president of the National Prisoners Reform Association, who was separately interviewed and was named and pictured, was quoted on the nature of his discussions with the new superintendent looking toward "meaningful reform."

usual first recourse will be to public records, which typically give him the necessary leads to those who may know something and be willing to tell him.

For example: If a reporter decided to investigate the quality of prison food or allegations of kickbacks to prison officials in charge of purchasing food, he would wish to see purchase orders, food contracts, payment vouchers, delivery receipts, etc. At that point, he might wish to interview specific prisoners about the food situation.

Or, if a reporter decided to investigate the quality of a vocational training project, he would wish to see the facility, budgets and purchase contracts, etc., and the records disclosing the educational background and training of the vocational teachers. At that point, he might decide it would be useful to interview particular named prisoners enrolled in the program.

Unless a news medium is willing to assign a reporter full time to develop the names of potential witnesses to poor quality food or poor quality vocational training, a denial of the records effectively prevents the reporter from knowing even the identity of the specific prisoner whom the reporter would wish to interview. Prison officials uniquely have the power thus to hide even the identity of persons who might be news sources.

In the case of detailed prison budgets, personnel records, disciplinary records and the like – which in some cases have been denied to reporters – there is not even a surface justification in prison security for any restrictions on access different from restrictions on the altogether comparable public records of other public agencies.

The burden of the substantive restrictions on access to prisons and prisoners is aggravated by a lack of defined procedures for seeking access. In many jurisdictions written

policies governing such access have not been established. Where written policies exist they are often not uniformly applied. Often when access requests are met with arbitrary denials, no reconsideration mechanism or administrative appeals are readily available. The reporter is often set upon a Catch-22 course when he tries to find out where to go for the information about prison life that he seeks.

We recognize that the Court in this case need not and probably will not wish to anticipate all that is involved in these other restrictions on access to prisons and prisoners. Any particular restriction can stand against the urgent claims of the First Amendment only on the strength of the particular justification that is offered for it, once access to prisons and prisoners is recognized as a part of news gathering that has "its First Amendment protections," *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). The illusory nature of the justification for the interview prohibition has been revealed on the record of this case. We believe that many other restrictions of which reporters complain would fare no better were they tested.

IV. IN PERFORMING ITS FUNCTION OF KEEPING THE PUBLIC INFORMED ABOUT PRISON AFFAIRS, THE PRESS MERITS THE PROTECTION OF THE FIRST AMENDMENT

When the press tries to report on life within correctional institutions, it is performing one of its very traditional functions, one that merits and has been held to have protection under the First Amendment.

The function is that of insuring that the public is informed about events of public importance that occur in places where, as a practical matter, not all members of

the public can be. The war correspondent, the reporter in a congressional press gallery or a press seat on the floor of a state legislature, the reporter who occupies a special desk in the courtroom of this Court all perform essentially that same function. Seldom do governmental authority and the press, asserting on behalf of the public the right effectively to gather news for the public's edification, squarely confront one another over this kind of access. Typically, the matter is worked out in the spirit of accommodation that animates our democratic, free and open society. There is little in the way of directly pertinent law. The dissection of the relevant First Amendment precedents is performed ably in the briefs of the parties. We would add only this:

The freedom of the press is specifically mentioned in the First Amendment along with freedom of speech. Something is thereby added to what the Amendment would say if only freedom of speech were mentioned. "The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, . . . to play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 219 (1966).[10] The press, the Court went on

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[10] The emphasis in this brief is, for understandable reasons, on the newspaper, periodical and electronic press as it is commonly thought and spoken of. That is the emphasis of this Court's free press opinions also. No more than this Court in the quoted passage from *Mills v. Alabama*, however, does the Committee mean artificially to restrict the scope of the "press" whose freedom is guaranteed by the First Amendment. Whoever undertakes to find something out and report on it or merely to expound his views to some large or small number of his fellow citizens is, on the Committee's view, a part of the press so far as the First Amendment guarantees are concerned.

to say in that case, "serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." The importance of the special constitutional capacity that the First Amendment confers on the press is demonstrated and underscored by one of this Court's landmark free press opinions, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

However vocal he might be, however diligent in exercising his right of free speech, the ordinary citizen could not successfully complain on First Amendment grounds of a license tax measured by the gross receipts from his principal source of revenue. But the newspapers of Louisiana did maintain in the *Grosjean* case a successful challenge to just such a tax on their advertising revenues on the ground that it constituted an impermissible abridgment of the freedom of the press. In sustaining the newspapers' challenge, this Court said:

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

> The tax here . . . is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Id.* at 250.

The significance of the specification of the press in the First Amendment must reside in part in the recognition that to protect the freedom of the press merely to speak, merely to publish what it has learned, is not enough. It must mean that there is full constitutional protection of what the Government in its brief in this case has described as the "crucial role" that the press plays in the fulfillment of the "right of the public to information about the affairs of state. . . ." The crucial role, on the Government's view, derives from the fact that "no individual has the time or the resources to gather all the information necessary to form intelligent opinions concerning the functioning of the Government." (Pet. Br. 48.)

The Government stops short of the point to which the logic of this position should take it when it in effect denies that Government has any obligation not to obstruct the channels through which news is gathered and asserts denigratingly, as if to answer with an aphorism all that its own earlier statements imply, that the First Amendment "is not defined by the convenience of the press."

It is, of course, not the convenience of the press that is served by the First Amendment. It is, as this Court has said, "the paramount public interest in a free flow of information to the people concerning public officials, their

servants." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). The opinions giving that explanation or one like it of the exalted purpose of the First Amendment are numerous. They are well summed up in the Government's own statement that "the First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government." (Pet. Br. 48.) They explain why, as the Government declines to recognize, this Court in *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972), said that news gathering is not without its First Amendment protections. It is the scope of those protections, not their existence, that on any fair view of matters is the issue here. When those First Amendment protections are recognized, a far more compelling showing of governmental interest than has been made in this case for the prisoner interview ban, or could be made in other cases for other restrictions on reportorial access, would be needed to sustain such clogs on the free flow of information that the public needs and deserves about public institutions.

The public interest in freer access to prisons and prisoners is indeed compelling. "The responsibility of the news media is to lift the veil of secrecy surrounding the nation's prisons, to give voice to both the victims of crime and of the criminal justice system, and to reveal the incredible waste that our jails and penitentiaries represent." vanden Heuvel, *The Press and the Prisons*, *supra* at 35. We recognize, of course, that prisons are institutions with unique problems. Access may not be barred altogether, but obviously it must be regulated for the sake of security and for other legitimate detention and correctional reasons. An arrangement for pooled access — with a single reporter or a few reporters representing their colleagues

– has been suggested. *Id.* at 38.[11] Arrangements of some sort can be made and will be made if this Court determines that the First Amendment so requires.

In asking that a First Amendment rule be laid down that will require correctional administrators to consider and devise rational access arrangements for the press, we do not say that the First Amendment guarantees "the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes, supra,* at 684. Rather, the press' access is guaranteed by the Constitution precisely because the public deserves access to publicly supported institutions, including prisons. The press asks to perform in a prison setting its traditional role of proxy for the public. The administration of prisons is a matter that in our system must be open to public oversight. By no means is it the sort of delicate, confidential matter exemplified by grand jury proceedings and the conferences of this Court, which were mentioned in *Branzburg v. Hayes* as cases in which the press' right to gather news must yield to an interest in confidentiality enforceable against all the world.

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[11] A substantial majority of prison administrators responding to the Committee's questionnaire (21 of 37) said that they would favor some type of pooling arrangement during emergencies.

CONCLUSION

The Reporters Committee for Freedom of the Press Legal Defense and Research Fund respectfully submits that the First Amendment requires the result reached by the court below and therefore asks that its judgment be affirmed.

Respectfully submitted,

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APPENDIX

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April 3, 1974

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Re: Saxbe v. Washington Post Co.
No. 73-1265

Dear Mr. Allen:

On behalf of the respondents in the above-captioned case, The Washington Post Company and Ben H. Bagdikian, I give consent to your filing of a brief amicus curiae on behalf of the Reporters Committee for Freedom of the Press Legal Defense and Research Fund.

Sincerely,

Richard M. Cooper

Richard M. Cooper

Office of the Solicitor General
Washington, D.C. 20530

April 3, 1974

William H. Allen, Esq.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Re: Saxbe v. Washington Post Company
No. 73-1265, October Term, 1973

Dear Mr. Allen:

In response to the request in your letter of April 2, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of the Reporters Committee for Freedom of the Press Legal Defense and Research Fund.

Sincerely,

Robert H. Bork

Robert H. Bork
Solicitor General